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No. 08-1074

In the Supreme Court of the United States

ELIZABETH ZACHARY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to Louisiana Supreme Court

BRIEF OF THE ORLEANS PUBLIC DEFENDER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the public defenders of Orleans Parish, Louisiana, move for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has neither confirmed nor denied consent.

Amicus curiae, responsible for representing indigent defendants, has a strong institutional interest in the resolution of the questions raised by the petitioner concerning the constitutionality of the Obstruction of Justice statute in Louisiana. Accordingly, *amicus* should be granted leave to file the attached *amicus curiae* brief, which demonstrates the potential for and reality of abuse of Louisiana's Obstruction of Justice law.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a statutorily-created office charged with representing indigent defendants, including those charged with *Obstruction of Justice* under La. R.S. 14:130.1.

Given *amicus curiae*'s institutional responsibilities, the offices of the Orleans Public Defender track and monitor the State's use and misuse of the obstruction of justice statute. *Amicus curiae* also has a critical perspective concerning the unrestrained prosecutorial and judicial discretion ceded within the statute and the Louisiana Supreme Court's interpretation of it. The abrogation of the jury trial right in this context has especially pernicious consequences.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or their counsel made a monetary contribution to this brief.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* now to address and resolve the constitutionality of Louisiana's Obstruction of Justice statute, La. R.S. 14:130.1, which permits the prosecution to prove to a judge (rather than a jury) the facts which determine the maximum available punishment.

In Louisiana, the Obstruction of Justice statute provides three separate penalty ranges depending upon the "proceeding" "obstructed." See La. R.S. 14:130.1(B)(1) (providing forty (40) year maximum for obstruction of justice in case involving a potential life or death sentence); *id.* at (B)(2) (providing twenty (20) year sentence for obstruction of justice of proceeding involving a sentence at hard labor less than life); *id.* at (B)(3) (providing for a five (5) year sentence for the obstruction of a proceeding involving a sentence not at hard labor).[2] Under Louisiana law, the district court rather than a jury makes the factual determination about what type of proceeding was obstructed.

In the preceding eighteen months, the Orleans Public Defender has represented over thirty-five defendants charged with obstruction of justice. In

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[2] The disparate sentencing ranges provided in La. R.S. 14:130.1(B) are magnified in the context of Louisiana's Habitual Offender Law. Under La. R.S. 15:529.1(A), the mandatory minimum for a second offender is half the statutory maximum, and the defendant is subject to twice the maximum term. Thus a defendant with a prior felony conviction is subject to a term of 2 and a half - 10 years for a violation of La. R.S. 14:130.1(B)(3); 10-40 years for a violation of La. R.S. 14:130.1(B)(2); and 20-80 years for a violation of La. R.S. 14:130.1(B)(1).

each of these cases, the defendant confronted the prospect of a judge and not a jury making the factual finding that determines the maximum punishment.

This case arises at a time when obstruction of justice laws are being "used increasingly." *State v. Jones*, 983 So.2d 95, 99 (La. 2008). Moreover, the Louisiana statute gives the State wide latitude to prosecute based upon a subjective determination that the defendant has not cooperated with the police or authorities. *Id.* at 102 ("This statute gives prosecutors wide latitude. . ."). Indeed, "[a] current investigation is not required." *Id.* at 103.

Given this wide latitude, a jury check on each element of the offense is an essential check on state authority. However, under Louisiana law, the judge rather than the jury is given the responsibility for determining which type of proceeding is obstructed. This determination raises the maximum available punishment four-fold. When combined with Louisiana's Habitual Offender law, the judge's determination raises the minimum and maximum punishment eight-fold.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOUISIANA COURTS HAVE ELIMINATED JURY REVIEW OF AN ESSENTIAL ELEMENT OF THE OBSTRUCTION OF JUSTICE STATUTE.

In 1735, John Peter Zenger[3] was prosecuted for seditious libel under a statute which required the

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[3] This Court has observed that at least one authority suggests:

jury to determine whether the defendant was guilty of printing and publishing the material but left to the judge the determination whether the words were libelous.[4]

In Louisiana, today, a defendant is charged with "Obstruction of Justice" under a statute which permits the jury to determine whether the defendant obstructed a proceeding, but leaves to the prosecutor and judge to determine what type of proceeding the defendant obstructed.

This Court, in *Jones v. United States*, noted the particularly pernicious impact that arises from the:

> the leading account of Zenger's trial was, with one possible exception "the most widely known source of libertarian thought in England and America during the eighteenth century." . . .It is just as much beyond question that Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion. See supra, at 17-20. One contributor to the ratification debates, for example, commenting on the jury trial guarantee in Art. III, § 2, echoed Blackstone in warning of the need "to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.

Jones v. United States, 526 U.S. 227, 247-48 (1999) (citing L. Levy, *Freedom of Speech and Press in Early American History* 133 (1963)).

[4] Cf. *Sparf v. United States*, 156 U.S. 51, 146 (1895) (Justices Grey and Shiras dissenting).

> attempts to confine jury determinations in libel cases to findings of fact, leaving it to the judges to apply the law and, thus, to limit the opportunities for juror nullification. Ultimately, of course, the attempt failed, the juries' victory being embodied in Fox's Libel Act in Britain, see generally T. Green, Verdict According to Conscience 318-355 (1985), and exemplified in John Peter Zenger's acquittal in the Colonies, see, e.g., J. Rakove, Original Meanings 300-302 (1996). It is significant here not merely that the denouement of the restrictive efforts left the juries in control, but that the focus of those efforts was principally the juries' control over the ultimate verdict, applying law to fact (or "finding" the law, see, e.g., id. at 301), and not the factfinding role itself. . . . That this history had to be in the minds of the Framers is beyond cavil.

Jones v. United States, 526 U.S. 227, 247-48 (1999).[5] See also *Apprendi v. New Jersey*, 530 U.S. 466

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[5] See also *Monge v. California*, 524 U.S. 721, 728-29 (1998) (Scalia, J. dissenting) (observing that the Sixth Amendment would not tolerate the provision of a jury trial on a limited question of culpability, leaving to the judge the determination of the essential fact that determined the maximum punishment as "If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be, to borrow a phrase from Justice Field, 'vain and idle enactments, which accomplished nothing, and most

(2000); *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia J. concurring) ("[A]s I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."). The lack of a jury check is especially pernicious in the context of offenses that could be described as crimes against the state or court; the very parties that might be described as a "victim" of the obstruction of justice are left to determine the maximum available punishment.

Whether for *Zenger* or *Zachary*, a scheme that provides for a jury determination of one element while providing that the judge determine the second fact, gives the façade of jury trial without any of its protection.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE PROSECUTION FOR "OBSTRUCTION OF JUSTICE" IN LOUISIANA IS WIDESPREAD AND SUBJECT TO ABUSE.

The *Zachary* case is not an anomalous instance of the operation of an imperfect statute but rather an

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unnecessarily excited Congress and the people on [their] passage.'").

example of a widespread practice with a significant impact on the operation of the justice system.[6]

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[6] See e.g., *State v. Jones*, 983 So.2d 95, 103 (La. 2008) (obstruction of justice charged where the defendant dropped a bag of marijuana from pocket when approached by the police on the ground that "a current investigation is not required."); *State v. Newton*, 973 So.2d 916, 922 (La. App. 2 Cir. 2007) (finding no *Apprendi* violation where "The trial court was only required to make a determination of the underlying criminal proceedings (as charged in the bill) that were the basis for the obstruction of justice charge."); *State v. Washington*, 977 So.2d 1060 (La. App. 3 Cir. 2008) (upholding sentence to ten years for, inter alia, obstruction of justice based upon an attempt to destroy evidence); *State v. McKinney*, 961 So.2d 589, 597 (La. App. 2 Cir. 2007) (upholding 5 year sentence for obstruction of justice); *State v. Butler*, 960 So.2d 1208, 1210 (La. App. 2 Cir. 2007) (upholding conviction for attempted obstruction of justice for allegedly tampering with evidence in a criminal proceeding in which a sentence of death or life imprisonment may be imposed); *State v. Roberson*, 929 So.2d 789, 804 (La. App. 2 Cir. Apr. 19, 2006) (upholding trial court's sentence of 40 years to defendant convicted of obstruction of justice); *State v. Uloho*, 875 So.2d 918 (La. App. 5 Cir. 2004), 888 So.2d 192; *State v. Parker*, 852 So.2d 3 (La. App. 4 Cir. 2003), (unpub'd), vacated on other grounds, 03-2736 (La. 2/20/04), 868 So.2d 23 (prosecution for obstruction of justice where defendant dropped a marijuana cigarette to the ground and then stomped on it in an attempt to obliterate); *State v. Celestine*, 671 So.2d 896 (La. 1996) (prosecution for obstruction of justice where the defendant purchased six rocks of crack cocaine from an undercover agent posing as a dealer, and upon immediate arrest, threw the rocks into the air and only one could be located from the gravel surface); *State v. Simon*, 607 So.2d 793 (La. App. 1 Cir. 1992), writ denied, 612 So.2d 77 (La. 1993) (obstruction of justice charged where the defendant flushed drugs down toilet); *State v. Papillion*, 556 So.2d 1331 (La. App. 3 Cir. 1990) (same). It is important to note that – in part because of the lack of jury trial protection -- the vast majority of obstruction of justice cases result in a plea.

Indeed, as the Louisiana Supreme Court has made clear, the charge of *Obstruction of Justice* is increasingly being used by prosecutors to bolster ancillary charges. See *State v. Jones*, 983 So.2d 95, 99 (La. 2008) ("This case comes at a time when obstruction of justice laws are being 'used increasingly against drug offenders who, in some fashion, attempt to destroy or conceal their drugs when being pursued by the police.'" (citing John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 La. L. Rev. 49, 51-52 (2004)); see also *id.* at 100 (noting the Louisiana statute is broader [than other states], as it includes within the definition of "tampering with evidence" the "intentional alteration, movement, removal, or addition" of any object or substance "at the location of any incident which the perpetrator knows or has good reason to believe will be the subject of any investigation.").[7]

The obstruction of justice statute also provides the state with a significant prosecutorial tool, in which accomplices, witnesses, and even defense lawyers can be charged with obstruction of justice for actions that – in the subjective view of the prosecutor – impede the prosecution.[8]

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[7] *Jones* recognizes that "This statute gives prosecutors wide latitude in misdemeanor cases to prosecute a person for obstruction. . . ." However the Court determined that this latitude was ameliorated by the "room for leniency" given to the sentencing judge. *Id.* at 103. The possibility of judicial leniency does not resolve the *Apprendi* problem.

[8] *State v. Watts*, 835 So.2d 441 (La. 2003), (noting that State's snitch/accomplice witness Anthony Spears was charged with obstruction of justice); *State v. Kyles*, 513 So.2d 265 (La. 1987) reversed on other grounds (noting that State witness was

Over the past eighteen months, there have been thirty-five charges of obstruction of justice in Orleans Parish alone. As in the *Zachary* case, a significant number of these individuals have also been charged under the habitual offender provisions of La. R.S. 15:529.1. These provisions result in the exponential increase in both the minimum and the maximum punishment available based upon the trial court's finding of what type of proceeding the defendant obstructed.

Amicus Curiae from Orleans Parish has a special interest in the resolution of this issue because, under the holding below, the circumstances in which the jury trial check is most essential become the circumstances in which its protection is most limited. Given a history in which Orleans Parish prosecutors have "tacked too close to the wind,"[9] the need for a

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subject to obstruction of justice charge if he failed to co-operate); *State v. Green*, 493 So.2d 1178, 1182 (La. 1986) (noting that defendant's attorney would have been subject to criminal prosecution for failing to disclose evidence provided to him under the attorney-client privilege); *State v. Hammler*, 312 So.2d 306, 310 (La. 1975) (noting "defense counsel are not exempted from prosecution under the statutes denouncing the crimes of obstruction of justice and subornation of perjury"). The potential for deleterious use of the statute is exacerbated where the jury check is eliminated.

[9] It must be observed that Louisiana (and Orleans Parish particularly) has been marred with jarring instances of prosecutorial indiscretion. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 441 (1995); *Monroe v. Blackburn*, 607 F.2d 148 (5th Cir. 1979); *In Re Jordan*, 04-B-2397 (La. 06/29/2005); 913 So.2d 775 (suspending Orleans Parish prosecutor for failing to turn over exculpatory information); *State v. Bright*, 02-KP-2792 (La. 05/25/04); 875 So.2d 37; *State v. Cousin*, 96-KA-2973 (La. 4/14/98), 710 So.2d 1065 (reversing on other grounds but noting

jury check on prosecutorial charging and judicial fact-finding is essential.

Certiorari review is further warranted here because the potential for significant criminal exposure (up to 80 years in prison) without a jury

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that in capital murder case, "[t]he prosecutor did not disclose this obviously exculpatory statement to the defense prior to the trial"); *State v. Lindsey*, 02 2363 (La. App. 4 Cir. 4/2/03), 844 So.2d 961; Michael Perlstein, *Jordan drops charges in 1975 murder; Two men freed on eve of retrial*, Times Picayune (New Orleans, La.), June 24, 2003, at Metro 1; *State v. Thompson*, 02-0361 (La. App. 4 Cir. 7/17/02), 825 So.2d 552; Gwen Filosa, *N.O. man cleared in '84 murder; New trial in Liuzza killing brings an emotional end to epic case*, Times Picayune, May 9, 2003, at National 1 (after retrial, Thompson acquitted in less than one hour); *State v. Lee*, 00-2429 (La. App. 4 Cir. 1/4/01); 778 So.2d 656; *State v. Marshall*, 81-3115 (La. App. 4 Cir. 9/5/95), 660 So.2d 819; *State v. Mims*, 94-0333 (La. App. 4 Cir. 1994); 637 So.2d 1253; *State v. Falkins*, 356 So.2d 415 (La. 1978); *State v. Parker*, 361 So.2d 226 (La. 1978); *State v. Curtis*, 384 So.2d 396 (La. 1980); *State v. Perkins*, 423 So.2d 1103 (La. 1982); *State v. Evans*, 463 So.2d 673 (La. 1985); *State v. Knapper*, 579 So.2d 956 (La. 1991); *State v. Oliver*, 94-1642, p. 30-34 (La. App. 4 Cir. 1996)("[a] prosecutor should not fail to make timely disclosure, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused."); *State v. Ates*, 418 So.2d 1326, 1329 (La. 1982); *State v. Peters*, 406 So.2d 189 (La. 1981); *State v. Davenport*, 399 So.2d 201, 204 (La. 1981); *State v. Dawson*, 490 So.2d 560, 563 (La. App. 4 Cir. 1986); *State v. Felton*, 522 So.2d 626, 627 (La. App. 4 Cir. 1988); *State v. Rosiere*, 488 So.2d 965, 969-71 (La. 1986) (failure to turn over statements of witnesses inconsistent with the prosecution case). Indeed, of the seven men exonerated from Louisiana's death row since 1981, four were prosecuted in Orleans Parish, and all four of these cases *Kyles*, *Cousin*, *Thompson* and *Bright* involved *Brady* violations.

determination may impel defendants to accept a plea and waive appellate review. Thus, though defendants are routinely charged with obstruction of justice in Orleans Parish, there are relatively few instances in which the statutory scheme can be challenged.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully suggests that the petition for a writ of certiorari be granted.

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